United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7236

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

ANNICE GILBERT,

Plaintiff-Appellant-Cross-Appellee,

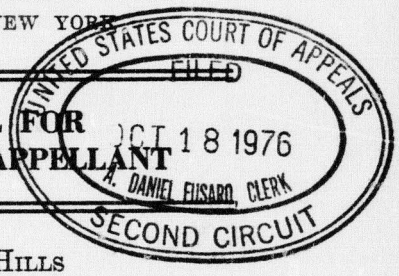
v.

P/S

CONSOLIDATED FOODS CORPORATION,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF ON CROSS-APPEAL FOR DEFENDANT-APPELLEE-CROSS-APPELLANT

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TABLE OF CONTENTS

Table of Authorities

Cases: PAGE

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Statement of Issues Presented for Review

I. Where the Complaint for breach of an alleged confidential disclosure agreement was never amended and did not include a claim for any "advisory services" and where the parties tried the case without realizing that the value of any "advisory services" was at issue, and where defendant did not consent, expressly or impliedly, to try said issue, was it error for the District Court to grant plaintiff a recovery for the "advisory services" which had not been at issue?

II. Where the record does not establish that there was an agreement, express or implied, to pay for certain "advisory services", was the District Court's finding that

plaintiff was entitled to a recovery in *quantum meruit* for such services clearly erroneous?

III. Where the claim for breach of an alleged confidential disclosure agreement failed, was it error for the District Court to substitute an award in *quantum meruit* for services which were not even the subject of the alleged contract?

IV. Where the District Court failed to specify with particularity how it reached the amount of its award and relied on factors which are not supported by the record, should the award be set aside as clearly erroneous and legally improper?

Statement of the Case

Plaintiff, Annice Gilbert, a citizen of New York, instituted this action on September 29, 1970, in the Supreme Court of the State of New York, New York County. On October 16, 1970, defendant, Consolidated Foods Corporation, a Maryland corporation, with a principal place of business in Chicago, Illinois, removed the case to the United States District Court, Southern District of New York, by reason of diversity of citizenship, 28 U.S.C. §1441.

The Complaint (37a-39a) alleged a single cause of action for breach of a written contract dated March 30, 1968 between Mrs. Gilbert and Aris Gloves, Inc.* concerning the alleged disclosure of a confidential idea which plaintiff claimed as her property. The alleged contract, which was

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* Subsequent to March 30, 1968, Aris Gloves, Inc. was merged into defendant which has continued to operate the company as the Aris Gloves Division of Consolidated Foods Corporation (hereinafter sometimes "Aris".)

a handwritten document, was not attached to the Complaint. However, it read *in toto* as follows:

"Right Bank Restaurant March 30, 1968

I, Lari Stanton, of 36 E. 36 St., Pres. of Aris Gloves—in the presence of witnesses—agree not to manufacture or reveal to anyone for a period of five years—the item of confidence that Annice P. Gilbert—will reveal to me—and agree that this item is her's solely having originated with her—is her sole property—and should I find this item (Gilbert's) to my interest—I will manufacture it—and give her reasonable return—for her idea.

/s/ Lari Stanton
Lari Stanton
Pres. Aris Gloves" (11a-12a)

As appears from the face of the alleged agreement, "the item" involved was not disclosed at the time the document was prepared, but was revealed only after its execution. According to the Complaint, that "item" was:

"that the defendant should manufacture and sell a hand glove made, at least in part, of Lycra Spandex, a fabric manufactured by E.I. DuPont De Nemours & Company, or other fabric with similar physical qualities, which fabric would benefit the hands of the wearer of the glove cosmetically and therapeutically by creating a massaging action on the hands and thereby depressing and flattening veins, increasing the blood circulation and otherwise have a beneficial effect, keeping the skin on the hands flat and smooth; and that Aris should manufacture and sell facial masks; socks, body suits, bandages and hose made, at least in part, of Lycra Spandex, which fabric would benefit the wearer of

the aforesaid products cosmetically and therapeutically in a manner similar to that described above." (38a)

Plaintiff claimed that Aris breached this agreement by manufacturing gloves and other products from Lycra Spandex, and utilizing the advertising themes claimed to have originated with plaintiff, all without compensation to plaintiff. (38a-39a) For this breach, plaintiff sought *inter alia* an accounting of defendant's profits for the use of said idea, a sum equal to the value of the idea, and punitive damages in the sum of $250,000.

Defendant's Answer generally denied the allegations of the Complaint and specifically alleged that the agreement sued upon was "null and void due to failure of consideration." (40a-41a) Subsequently, defendant successfully moved to amend its Answer to include an affirmative defense that the alleged agreement was "void pursuant to §5-701 of the New York General Obligations Law, commonly referred to as the Statute of Frauds." (41a)

The case eventually came on for trial before the Honorable Morris E. Lasker, U.S.D.J. on December 16, 17, 18, 19, 23 and 24, 1974 and January 17 and 29, 1975, at which time the Court considered only the issue of liability. As the Complaint (which was never amended or supplemented), the jointly proposed Pre-Trial Order (43a-49a) and the proceedings at trial make clear, both parties thought that the only issue being tried was whether plaintiff was entitled to recover for the idea she allegedly disclosed to Aris pursuant to the written contract.

By Memorandum opinion dated May 21, 1975, Judge Lasker found that Aris had had prior knowledge of both the glove fabric and advertising ideas disclosed by Mrs. Gilbert and thus held that she was not entitled to recover

therefor. In addition he held that the written agreement was unenforceable due to vagueness as to essential terms and that an alleged simultaneous oral agreement for a royalty based on a percentage of sales was barred by the Statute of Frauds. (9a-24a)

Although the Court thus rejected any recovery based on the alleged disclosure by plaintiff, it proceeded to rule that plaintiff was entitled to compensation in *quantum meruit* not for the ideas which were the subject of the Complaint, but for "advisory services" rendered to Aris by plaintiff *after* the disclosure of the idea. Accordingly, it directed that a trial be held on the issue of damages.

Thereafter, plaintiff moved pursuant to Rule 52(b), Fed. R. Civ. P., to amend the Court's findings of fact and conclusions of law as "against the weight of the credible evidence", filing a 58 page brief in support of her motion. By an "Endorsement" dated October 14, 1975, Judge Lasker denied the motion noting *inter alia* that his decision was based in part on his observation and assessment of the credibility of all witnesses. (25a)

The trial on damages was held on September 3, 1975. At that hearing, plaintiff sought to evade the District Court's finding that plaintiff was not entitled to recover for the ideas she allegedly disclosed. Plaintiff chose not to offer any testimony as to the amount of time and effort involved in Mrs. Gilbert's work after March 30, 1968, but instead, presented three expert witnesses who testified that Mrs. Gilbert, as the supposed originator of the idea of the gloves, should be compensated on the basis of a percentage of sales of the gloves which Aris sold.

Defendant presented an expert witness who testified that Mrs. Gilbert's compensation, if any, should be on an hourly basis at the rate of a maximum of $10 per hour,

based on prevailing rates for free-lance advertising consultants in 1968-1969 and recognizing that Mrs. Gilbert was not a professional but was merely commenting on the work which professionals had created for Aris.

By Memorandum dated March 16, 1976, Judge Lasker did not accept the theories of either plaintiff or defendant but proceeded to hold that Mrs. Gilbert was entitled to receive $12,000, with interest from September 18, 1969. (26a-36a)

Judgment in favor of plaintiff in the amount of $17,248 (including interest) was entered on April 12, 1976. (8a) On May 10, plaintiff filed her Notice of Appeal from that judgment and on May 21, defendant filed a Notice of Cross-Appeal "from those portions of the memorandum decisions herein . . . and from the final judgment . . . which grant plaintiff relief herein." (42a)

The appeal by plaintiff-appellant was dismissed on September 29, 1976, for failure to file her brief and appendix and plaintiff's motion to reinstate such appeal was denied on October 6, 1976. Accordingly, only defendant's cross-appeal is now before this Court for consideration.

ARGUMENT

Introduction to Argument

Defendant takes issue with that portion of the opinion and judgment below which awarded a $12,000 recovery, with interest, to Mrs. Gilbert.

First, the award was on grounds and for services for which plaintiff made no claim, which were not included in the Complaint and which were not viewed as issues to be tried by the parties. In this respect, defendant was surprised by the award and prejudiced in that it was never

given the opportunity to elicit evidence negating the propriety of a *quantum meruit* recovery for services supposedly performed by plaintiff after March 30, 1968. The prejudice involved here is sufficient to require reversal of the recovery below.

Second, even assuming arguendo that such a *quantum meruit* claim was properly at issue, there was not proof of the elements necessary to justify a recovery.

Third, the District Court erred in allowing a recovery in *quantum meruit* in lieu of recovery in contract. The application of a *quantum meruit* test was improper because the services involved were not those which were the subject of the alleged contract.

Fourth, the amount of the award is simply unjustified on the record below. It is, literally, a figure picked out of the air with no relation to any established benchmark. Such an award should not be allowed to stand.

POINT I

The Granting of Relief in *Quantum Meruit* Was Improper.

From the time of the institution of this action in 1970 through trial, the issues between the parties were (a) what had Mrs. Gilbert disclosed to defendant on March 30, 1968 and (b) whether she was entitled to recover therefor. Mrs. Gilbert claimed in her Complaint, her pretrial testimony and at trial, that on March 30, 1968 she disclosed to Mr. Stanton, the President of Aris, the idea of making a glove from Lycra spandex which could be advertised and promoted as having certain therapeutic and cosmetic effects

upon the hand of the wearer and that, in fact, Aris utilized her ideas when it marketed its "Hands Beautiful" or "Isotoner" glove in September, 1969.

Defendant contended throughout that, well prior to March 30, 1968, Aris had been underway with the project of making a glove out of a particular Lycra spandex fabric which could be advertised as sort of a "Supp-Hose" for the hand. Moreover, defendant contended that Mrs. Gilbert's disclosure on March 30 was not as she claimed, but rather was a suggestion that Aris make a night mitten out of a "powernet" material which could be promoted as helping to flatten the veins on the back of the hand. While not interested in a night mitten, Mr. Stanton was taken by the advertising concept of flattening prominent veins and, since he planned to, and initially but briefly did, utilize that suggestion in connection with the Hands Beautiful glove, he had expected to pay Mrs. Gilbert for that single idea.*

It was towards proof of these allegations that each side directed its efforts from 1970 through trial. At no time, however, was a claim advanced by plaintiff for the value of any time she might have spent on the development of the Hands Beautiful glove *after* March 30, 1968 and up to the time of its commercial introduction in September, 1969. Testimony was admitted as to her continuing contacts with Mr. Stanton concerning the project but such testimony was offered by plaintiff as relevant to the basic issue of the March 30, 1968 disclosure. Plaintiff's theory was that if Mrs. Gilbert had not at that time made the disclosure she claimed, then she would not have been involved in the

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* Such idea was abandoned shortly after the commercial introduction of the glove and was of no value because the Food and Drug Administration asserted that such a claim violated the Food and Drug Act. The District Court denied recovery for this idea because, according to Mrs. Gilbert's own testimony, she disclosed the idea voluntarily to Mr. Stanton prior to March 30, 1968. (21a)

development of the glove. Put another way, the fact that Mr. Stanton did keep Mrs. Gilbert advised of the development of the glove made it more likely for the Court to believe that she had been the originator of the product.*

For example, when plaintiff called Mr. Stanton as her first witness and sought to question him as to his conversations with Mrs. Gilbert after March 30 concerning the supposed therapeutic benefits of the glove, the following dialogue took place:

> "Q. What was it that brought about your discussing that with them after March 30, 1968?
>
> The Court: I really don't see why this is proper redirect. I don't recall any of this material on cross-examination.
>
> *I am fully aware of the fact that these conversations occurred. It seems to me perfectly obvious that one of the reasons, and this is what I assume you are trying to prove is that Mrs. Gilbert made such suggestions and claims and they had to be discussed.*" (102a; emphasis added).

The quoted comment by Judge Lasker documents that the significance of these later conversations was to shed light on the issue of what happened on March 30.** See also, 108a-109a; 116a-117a.

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* The testimony as to events after March 30, 1968 was also relevant to complete the factual picture as to the development of the glove, all to allow the Court to determine what the initial disclosure had been. (See, for example, the colloquy at 116a-117a.)

** The Court's statement that "I don't recall any of this material on cross-examination" also establishes that defendant had not inquired into these post-March 30 conversations on its cross-examination of Mr. Stanton. This was because those conversations were of only peripheral significance to the issues being tried.

Thus, Mrs. Gilbert did testify that she was shown various samples of gloves and advertising materials and that she made comments thereupon. (103a-110a; 114a-115a) Similarly, Mr. Stanton testified on examination by plaintiff's counsel that his social relationship of many years with the Gilberts had continued and that he had discussed the Hands Beautiful project with Mrs. Gilbert on about a dozen occasions between March 30, 1968 and September, 1969. (61a-70a; 92a-95a)

But, none of this testimony was directed to the possibility of a *quantum meruit* recovery which would not include the ideas allegedly disclosed on March 30, 1968. Neither Mrs. Gilbert, nor Mr. Stanton, was ever even asked the basic question as to whether there was an agreement or understanding that Mrs. Gilbert was to be compensated for her time or suggestions after March 30, and no effort was made during the trial on liability to quantify her time or to determine specifically which, if any, of her suggestions were actually utilized by defendant.

The record is quite clear that a potential recovery for post-March 30 "advisory services" was never at issue. This is shown by the Complaint (37a-39a) and Answer (40a-41a), the jointly proposed Pre-Trial Order (43a-49a), as well as in the colloquy on defendant's motion to dismiss at the close of plaintiff's case (118a-151a) and during the summations. (159a-188a) Nowhere in the record is there any discussion of such an issue.

Under these circumstances, and given the fact that there was never a motion or even mention of amending the pleadings to include the *quantum meruit* issue, defendant was surprised to read in Judge Lasker's opinion on liability that, while plaintiff could not recover for the product, fabric or advertising concepts she allegedly disclosed on March

30, 1968, she was entitled to recover "for the reasonable value of her services [thereafter] in advising Aris in connection with the development and promotion of the 'Hands Beautiful' and 'Isotoner' gloves . . ." (23a)

We submit that the District Court was in error in granting such recovery.

A. No Claim for the Supposed Services Was Alleged by the Complaint and An Implied Amendment to Conform to the Evidence Was Not Proper Under Rule 15(b), Fed.R.Civ.P.

In its decision, the District Court did not consider the fact that the recovery granted was not within the scope of the pleadings or pre-trial order and did not consider whether amendment was appropriate under Rule 15(b), Fed.R.Civ.P. Accordingly, we shall treat the decision as impliedly granting a motion to amend. Under the rule, it was error to amend the pleadings here.

Rule 15(b), Fed.R.Civ.P., provides, in relevant part:

> (b) AMENDMENTS TO CONFORM TO THE EVIDENCE
>
> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

The critical question here, aside from the fact that no such motion was made, is whether or not the *quantum meruit* issue was "tried by express or implied consent of

the parties." Clearly, there was no express consent and, we submit, it is similarly apparent that there was no implied consent.

The fact that evidence which might be considered relevant to the *quantum meruit* recovery was introduced at trial does not change the conclusion that the issue was not properly tried within the meaning of the rule. As Professor Moore has written:

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial." 3 J. Moore, FEDERAL PRACTICE ¶15.13[2] at 991-2 (2d Ed. 1974); *Simms* v. *Andrews,* 118 F.2d 803, 807 (10th Cir. 1941); *Macris* v. *Sociedad Maritima San Nicolas, S.A.,* 245 F.2d 708, 711 (2d Cir. 1957), *cert. den.* 355 U.S. 922 (1958); *Gallon* v. *Lloyd-Thomas Co.,* 264 F.2d 821, 825 (8th Cir. 1959); *Wirtz* v. *Savannah Bank & Trust Co.,* 362 F.2d 857, 862 (5th Cir. 1966); *Armstrong Cork Co.* v. *Lyons,* 366 F.2d 206, 209 (8th Cir. 1966).

This statement is applicable at bar since, as shown above, the evidence as to Mrs. Gilbert's expenditure of time after March 30, 1968 was introduced as relevant only to the pleaded issue of a contractual relationship between the parties.

At no time did defendant recognize or was it made aware of any potential liability for advisory services rendered after March 30, 1968. Obviously then, it did not impliedly consent to trying of this issue. Moreover, the failure to advise defendant of such issue caused it substantial prejudice since it was not aware of a need to elicit evidence which would negate such an award. Specifically, Mr. Stanton repeatedly testified that he had promised to be fair with Mrs. Gilbert and to compensate her for the one idea (flattening the veins on the back of the hands) which she had disclosed on March 30 and which he liked and intended to utilize. (52a; 60a; 67a-68a; 100a) However, he was never asked (because defendant was not aware it was in issue) whether he ever offered or intended to pay for her so-called "advisory services" after March 30.*

In sum, defendant has been prejudiced by the failure of notification.

> "The test for allowing an amendment under Rule 15(b) to conform pleadings to issues impliedly tried is whether the opposing party 'would be prejudiced by the implied amendment, i.e. whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case was to be retried on a different theory.'" *Lomartira* v. *American Automobile Insurance Co.*, 371 F.2d 550, 552 (2d Cir. 1967), quoting, 3 J. Moore, FEDERAL PRACTICE ¶15.13[2] at 993 (2d Ed. 1974).

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* Mrs. Gilbert too was never asked this question. Indeed, the best that can be inferred from the record is that she expended time and energy after March 30, because she expected to be paid for her disclosure of ideas on that date and it was in her interest to make the project succeed. Thus, she testified that the dinner meetings with Mr. Stanton were "exciting because I thought something would evolve from it, if he followed my trend of thought on it". (105a)

Defendant has been prejudiced here in that it did not have the opportunity at the trial on liability to elicit evidence which would negate the *quantum meruit* recovery and fully explain that these later contacts with Mrs. Gilbert were mainly social in nature and were not undertaken with any conception that Mrs. Gilbert was to be paid for her time.

The statement of the Third Circuit in *Freitag* v. *The Strand of Atlantic City,* 205 F. 2d 778, 781 (3rd Cir. 1953), is relevant here.

> "Nowhere in the record does there appear any expression by [defendant] or his counsel acquiescing to the trial of the issue. And we find it difficult to determine on the record whether the parties even regarded this issue as a matter then being litigated."

Any implied amendment of the pleadings was improper under Rule 15(b) because there was no trial of the issue underlying the Court's decision in favor of plaintiff. The judgment in favor of plaintiff should be reversed.

B. The Award in *Quantum Meruit* Cannot be Justified as a Substitute for Recovery on the Unenforceable Contract and, in Any Event, Is Not Justified on the Record Below.

The recovery in *quantum meruit* is further flawed in that it was improperly awarded as a substitute for an award on the unenforceable contract. This is obvious from the face of the decision on liability.

In that decision, the District Court stated:

> "As noted above, the agreement provided that should Stanton
>
> > 'find this item (Gilbert's) to my interest—I will manufacture it—and give her reasonable return—for the idea.'

"While Mrs. Gilbert attempted to extract from Stanton a promise to fix that return at 8% of sales, the parties never specified such compensation orally or in writing. The claim for a royalty, therefore, fails because since its payment would have extended beyond one year it could not be enforced unless in writing, N.Y. Gen. Ob. Law §5-701 (1). This leaves the question whether Mrs. Gilbert can recover under the provision of the March 30, 1968 agreement. Such a provision has been held unenforceable for vagueness under New York Law. *Varney* v. *Ditmars,* 217 N.Y. 223, 228 (1946) ("a fair share of my profits"); *Bloemner* v. *Garvin,* 120 App. Div. 29, 104 N.Y.S. 1009 (1907) ("fair share of commissions"); *Mackintosh* v. *Kimball,* 101 App. Div. 494, 92 N.Y.S. 132 (1905) ("satisfactory amount"); *Mackintosh* v. *Thompson,* 58 App. Div. 25, 68 N.Y.S. 492 (1901) ("satisfactory amount").

"However, as the court noted in *Varney:*

> 'In the case of a contract for the sale of goods or for hire without a fixed price or consideration being named, it will be presumed that a reasonable price or consideration is intended and the person who enters into a contract . . . is liable . . . as on an implied contract.'

"In *Varney,* 217 N.Y. at 228, the court allowed recovery on *quantum meruit* by a party who had performed in reliance on the contract terms. Accord, *Bialostok* v. *Wilson,* 191 Misc. 385 (1948); *United Press* v. *N.Y. Press Co.,* 164 N.Y. 406, 412 (1900). A similar recovery is appropriate here. That as of March 30, 1968 Mrs. Gilbert was no longer willing to give Stanton business suggestions for nothing is evident from her refusal to divulge her idea without a written agreement; and that Stanton was willing to

pay for her services is evidenced not only by his signing the March 30th document but also by his consistent reassurances that he would be 'fair' to Mrs. Gilbert." (19a-20a).

It is clear that the District Court granted recovery in *quantum meruit* as a substitute for a contractual recovery. This was inconsistent and improper since the Court rightly found that plaintiff was not entitled to recover for her alleged contractual disclosure because it was already known, and of no value, to defendant. Further, the Court's reliance on *Varney* v. *Ditmars,* 217 N.Y. 223 (1916), *Bialostok* v. *Wolfer,* 191 Misc. 385, 77 N.Y.S.2d 222 (Sup. Ct. Kings Co. 1947) and *United Press* v. *New York Press Co.,* 164 N.Y. 406 (1900) is misplaced. At best, they support the proposition that, under certain circumstances, a court may substitute a recovery in *quantum meruit* for the same services which were the subject of a failed contract.* Here the services underlying the award were not the subject of the unenforceable contract.

Moreover, the Court was incorrect in its finding that one of the elements of *quantum meruit* recovery—circumstances which imply an agreement to pay for the services rendered —was established at bar. Indeed, the District Court itself found that "Stanton bargained for, and was willing to pay for ideas, but only for ideas that were conceived by Mrs. Gilbert, novel to Stanton and actually used by Aris." (21a) Her later "advisory services" simply do not meet these tests since there is no evidence that her suggestions were novel nor any findings that any particular ideas were used. Mr. Stanton's signing of the March 30th document was evidence only of his willingness to pay for a useful disclosure made on March 30. Similarly, his "consistent

* Contrary to the District Court's statement, neither Varney nor United Press granted a *quantum meruit* recovery.

reassurances that he would be 'fair' to Mrs. Gilbert" were directed only to her disclosure on March 30 of one idea, which he had initially thought to be useful, that of flattening the veins on the back of the hands. (52a; 100a)*

Accordingly the record does not support a finding for plaintiff in this respect.

C. The Reversal of the Judgment Below Should Not Include a Remand for Further Proceedings.

Since the District Court's implied amendment of appellant's pleadings, and its award of a recovery in *quantum meruit* were improper, the Court should reverse the judgment for plaintiff and direct the entry of judgment for defendant.

After six years of litigation, during which time plaintiff did not seek to recover for her "advisory services", the matter should come to an end. As noted, there has been no amendment of the pleadings here and an implied amendment pursuant to Rule 15(b), Fed.R.Civ.P., is not appropriate. Plaintiff never gave any indication of a desire to seek leave of court for an amendment pursuant to Rule 15(a), Fed. R.Civ.P., and, even if she were now so inclined, the interests of justice require that leave should be denied.

The discretion which a district court has to grant leave to amend under Rule 15(a) is not "so broad as to permit an amendment when the other party would be substantially prejudiced thereby.", *Ricciuti* v. *Voltarc Tubes, Inc.*, 277 F. 2d 809 (2d Cir. 1960); see *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). The cases hold that such prejudice, requiring denial of amendment, exists where the proposed amendment is unduly delayed, *Stanek* v. *Trail-*

* See footnote at p. 8.

mobile, Inc., 283 F.2d 827, 828 (7th Cir. 1960); *Anderson* v. *National Producing Co.*, 253 F.2d 834, 838 (2d Cir. 1958), *cert. denied* 357 U.S. 906 (1958); *Wheeler* v. *West India SS. Co.*, 205 F.2d 354 (2d Cir. 1953), *cert. denied*, 346 U.S. 889 (1953). Clearly, there is undue delay at bar and defendant would be prejudiced by the further prolongation of these proceedings due to plaintiff's election, over six years ago, not to seek recovery on this claim. Cf., *Albee Homes, Inc.* v. *Lutman*, 406 F.2d 11, 14 (3rd Cir. 1969) (motion to amend denied because of three year delay and because the matters sought to be alleged had been known from the start).

Moreover, an amendment at this time could not survive a statute of limitations defense. The statutory period for such an action in New York is six years. C.P.L.R. §213(2). The last services allegedly performed by plaintiff occurred over six years ago on September 18, 1969. An amendment now would not "relate back" to the filing of the original complaint within the meaning of Rule 15(c), Fed. R.Civ.P., since the original Complaint did not give defendant notice of any claim for services rendered after March 30, 1968. *Rosenberg* v. *Martin*, 478 F.2d 520, 526 (2d Cir. 1973), *cert. denied* 414 U.S. 872 (1973); *Griggs* v. *Farmer*, 430 F.2d 638 (4th Cir. 1970). Indeed, the same lack of notice and prejudice that would require reversal of the judgment below as shown at Point IA *supra*, would apply to prevent a relation back under Rule 15(c). Absent such relation back, any amendment now would be barred by the statute of limitations.

Plaintiff has had her day in court on the issues she chose to put forward. She has waived her right to pursue her appeal from the opinion denying her recovery on those issues and the matter should end there, with judgment for defendant.

POINT II

The Amount of the Award Below Is Not Supported by the Record and Should Be Reversed.

There is another and independent reason requiring reversal of the judgment below, namely, that the amount of the award is not supported by the record and is clearly erroneous.

In its opinion on damages dated March 16, 1976 (26a-36a), the District Court set forth several factors underlying the amount of the award. Without exception, they are unsupported by the evidence and, equally important, as a whole they give no guidance as to how the District Court arrived at the amount of $12,000.

The evidence adduced at the damage hearing indicated that the hourly rate for free lance advertising consultants in 1968-1969 was from $10-20 an hour. (29a; 232a-237a) It was further established that Aris had in fact hired an independent consultant firm in October 1968 which continued on the project through November 15, 1969. (213a-214a) This firm, Harvey Chanler Associates, was responsible for:

> "The development of labeling, packaging, advertising copy, merchandising, development of TV scripts, radio scripts, development of point of sale displays, sales girls selling cards, sales girls selling tips, statement enclosures, contact with media such as NBC in connection with possible TV, contact with outside consultants." (214a)

For this work, which involved the creation and execution of these materials as opposed merely to commenting on

them (see exhibit 26 at 244a-281a), the Chanler group received a flat fee of $435 a month. (214a; Ex. A at 283a-298a) The fee included the services of two or three professionals in addition to Chanler himself. (215a-216a)

Based on this reference point, and on the 1968-1969 free lance rate of $10-20 for professionals, defendant's expert witness, Mr. Sheerin, testified that a reasonable compensation for Mrs. Gilbert would at most be about $10 per hour. (237a-241a) In reaching this conclusion, he noted that she was an amateur, not a professional, and that she was merely a critic, and not a creator of the advertising concepts or copy. (241a-242a)

Despite the complete absence of any contrary testimony presented by plaintiff on these points,* the District Court rejected Mr. Sheerin's expert opinion on the grounds that the hypothetical question presented to him did not include Mrs. Gilbert's "suggestions as to the design and fit of the glove [and] the fact that Mrs. Gilbert made herself available to give such advice whenever Stanton requested it." (32a) We submit that the rejection of Mr. Sheerin's opinion was improper since, although it might fairly be said that the Court had found that Mrs. Gilbert made suggestions as to the design and fit of the glove, there was no evidence that her suggestions were utilized by Aris in the final commercial product, and indeed, Mr. Stanton denied that they were (216a-217a).** Significantly, Judge Lasker did not find that her suggestions were in fact utilized.

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* Plaintiff's three experts testified that Mrs. Gilbert should be compensated on a percentage of sales basis. Judge Lasker properly rejected this testimony since it was based on the erroneous assumption "that Mrs. Gilbert was a major, if not *the* primary engineer behind the development of the glove itself and the advertising and promotional campaigns undertaken in connection with the sale of the glove." (29a)

** The record has never formally been amended to reflect the pencilled in "no" at line 18 of page 139 of the transcript. (217a)

The other ground employed by the District Court in rejecting Mr. Sheerin's testimony is equally flawed. Its suggestion that Mrs. Gilbert made herself available for advice to Mr. Stanton at all times is devoid of support in the trial record and is not to be found even in the initial decision on liability. To the contrary, that opinion found only that "Stanton periodically discussed the glove with the Gilberts" (16a); that "Stanton discussed his advertising ideas with the Gilberts on approximately twelve occasions" (17a); and that "the Gilberts also attended press parties for promotion of the gloves." (17a).*

Also there is literally no evidence to support the District Court's further findings that "Stanton relied upon Mrs. Gilbert to be available for comment and advice whenever he desired" and that "the at hand availability of Mrs. Gilbert's service was clearly a significant part of her value to Aris." (34a-35a) Moreover, the finding of "reliance" is directly at odds with Judge Lasker's statement during the damage hearing that the question of reliance was not relevant because "the question of value of services depends on what they were worth, not on what they were relying." (191a)

It is significant that the District Court fails to cite any record references in support of these remarkable findings

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In our post-hearing Memorandum with regard to damages, we noted that "It appears that, because of Mr. Handelman's simultaneous statement, the reporter failed to note Mr. Stanton's answer of "no" to the question which appears at lines 15-17 on page 139. Accordingly, the record should be corrected pursuant to Rule 60(a), Fed. R. Civ. P. to note the negative reply". Plaintiff did not object to this statement.

* These discussions were usually at social dinner engagements which continued among these old friends (92a-94a) and, at the press parties, Mrs. Gilbert was only a guest, not a participant on the program. (96a-98a)

despite the fact that throughout its opinions on liability and damages it made such references frequently. The fact is that no such references exist to document these findings.

To the contrary, the record established that Aris had been a leading company in the glove industry for decades, that Mr. Stanton had been an executive with that company since 1949 (50a), that Aris had its own glove factories in the Philippines and Puerto Rico, and had utilized the services of Somark Gloves in Pennsylvania as an independent contractor in developing the prototypes and initial manufacture of the glove. (14a-16a) In terms of the development and manufacture of these gloves, it was abundantly clear that Aris utilized its own experience and those of other professionals. Similarly, in connection with advertising and the promotional part of the project, Aris retained professionals to create and execute the necessary materials. In sum, there was no "reliance" on Mrs. Gilbert. She was kept advised of the project as a matter of courtesy among two old friends who met socially because she had, in Mr. Stanton's view, contributed one advertising idea which he liked and initially intended to utilize.*

It was further incredible and incorrect for the District Court to allude in its conclusion to "the quality of her [Mrs. Gilbert's] work" (35a) as a basis for giving her more than the professionals received. Nowhere did the District Court make a finding that her work was of a high quality and, as stated, the opinions below give us no clue as to which, if any, of her suggestions were utilized. Accordingly, it is impossible to determine which contributions of Mrs. Gilbert were of such quality and value to justify the award. Given this lack of explicitness, the Dis-

* The record also establishes that Mr. Stanton informally solicited the views of several other people concerning the glove and the promotional materials. (58a)

strict Court could have awarded Mrs. Gilbert any amount it chose and the figure of $12,000 is one picked out of the air. This lack of specificity is grounds for reversal. *Alexander* v. *Nash-Kelvinator Corp.*, 261 F.2d 187, 190 (2d Cir. 1958).

In addition, we note that the $12,000 award was granted as a "project fee" (34a) by the District Court as opposed to an hourly rate basis. Mr. Sheerin testified that compensation on such basis was only proper where there was agreement *in advance* between the parties. (242a-243a; Damage Hearing Transcript, September 3, 1975, at 194-196) Here, it is inconceivable that Mr. Stanton would have agreed in advance to pay his friend Mrs. Gilbert $12,000 for being available to make comments over dinner as to the development of this project.

We respectfully submit that the damage award should not be sustained not only because there was no basis for the granting of any award but also because the opinion setting the amount of the award is contrary to the record and insufficiently explained. In this connection, a remand for further proceeding is not necessary even if this Court should find that an award in some amount was proper. There is no question as to the credibility of witnesses at the damage hearing and this Court is in as good a position as the trial court to make a determination of a proper amount.

For the reasons stated above in Point I, as well as because there is not sufficient evidence to support the amount of any award, we believe no recovery whatsoever is justified. If this Court disagrees, however, then we suggest that the award be reduced to reflect the fact that Mrs. Gilbert was not a professional and made no significant contribution, if any, to Aris' efforts in the development of the glove between March 30, 1968 and September 1969.

At the damage hearing, plaintiff elected not to offer testimony related to the issue of subsequent services. Instead, the testimony of plaintiff's witnesses assumed that the compensation of plaintiff should be predicated on her services as the supposed originator of the glove, a supposition which the Court had rejected. Thus, the only relevant testimony came from defendant's witness who indicated that a maximum value would be $10 per hour for the perhaps dozen meetings which the District Court found to have occurred. Accordingly, a proper award would be more like $240 (at two hours per dinner), instead of $12,000. Certainly, under no circumstances, should plaintiff receive as much as the entire Chanler group, the professional advertising consultants, whose total compensation, through November 15, 1969, was $5,870. (216a)

CONCLUSION

For the reasons stated above, the judgment in favor of plaintiff should be reversed with instructions to enter judgment in favor of defendant.

Respectfully submitted,

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Service of 2 copies of this within
Brief is admitted this
18 day of October 1976.

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